No. 18-422

IN THE
Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,
Appellants,
v.
COMMON CAUSE, ET AL.,
Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF NEITHER PARTY

Robert D. Popper
Counsel of Record
Eric W. Lee
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

Dated: February 12, 2019

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A Requirement that Plaintiffs Show Discriminatory Partisan Intent Is Meaningless, Because Partisan Mapmakers Always Have Partisan Intent 6

II. A Requirement that Plaintiffs Show a Particular Quantum of Electoral Harm Risks Becoming a Federal Guarantee of Proportional Representation 7

III. The Only Manageable Way to Control Gerrymandering is to Look for and Enjoin the Distortion of District Lines 9

CONCLUSION 12

TABLE OF AUTHORITIES

Cases **Page(s)**

Benisek v. Lamone, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 (D. Md. Nov. 7, 2018) 4, 5, 6

Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018) ..... *passim*

Davis v. Bandemer, 478 U.S. 109 (1986) 6, 9

Gaffney v. Cummings, 412 U.S. 735 (1973) 6

Gill v. Whitford, 138 S. Ct. 1916 (2018) 2, 8

Lamone v. Benisek, No. 18-726 (2018) 3

Parrott v. Lamone, No. GLR-15-1849, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016) 2

Shaw v. Reno, 509 U.S. 630 (1993) 6

Vieth v. Jubelirer, 541 U.S. 267 (2004) 3, 6, 9-10

INTERESTS OF THE *AMICI CURIAE*[1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan, nonprofit § 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici are experts in the important political and constitutional questions concerning partisan gerrymandering that are raised by the district court's decision. *Amici* believe, moreover, that partisan gerrymandering gives rise to a justiciable constitutional claim, and they have argued for their own standard based on violations of traditional districting criteria during their own challenge to the same congressional redistricting plan in Maryland.

---

[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have consented to the filing of *amicus* briefs in this case.

See Parrott v. Lamone, No. GLR-15-1849, 2016 U.S. Dist. LEXIS 112736 (D. Md. Aug. 24, 2016), *appeal dismissed*, 137 S. Ct. 654 (2017). *Amici* previously appeared as *amici* in *Gill*, discussing the numerous practical shortcomings of the "efficiency gap" analysis proposed by the plaintiffs in that case. *See* Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants at 4-15, *Gill v Whitford*, No. 16-1161.

SUMMARY OF ARGUMENT

The district courts in North Carolina and Maryland failed to establish a workable test for gerrymandering for two reasons. First, as the Court has frequently recognized, partisan motives are always part of the process of drawing district boundaries. In consequence, the requirement imposed by the district courts below that plaintiffs show discriminatory partisan intent does not help to distinguish a gerrymandered district from any other kind of district. Second, the district courts' requirement that plaintiffs show some sort of effect risks indirectly importing an obligation that parties' electoral outcomes approximate a system of proportional representation.

If a workable test for gerrymandering is to be constructed, this Court should adopt a standard that focuses on the quantifiable violence that partisan mapmakers do to district boundary lines and political subdivisions.

ARGUMENT

In this case and in *Lamone v. Benisek*, No. 18-726, three-judge district courts determined that the states of North Carolina and Maryland, respectively, have engaged in unconstitutional partisan gerrymandering. The Court is now asked to determine whether either district court was able to solve the central problem of gerrymandering jurisprudence, namely, that of identifying "judicially discernible and manageable standards for adjudicating political gerrymandering claims." *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion). As set forth below, the district courts have failed.

In North Carolina, the district court held that the State had engaged in partisan gerrymandering that violated the Equal Protection Clause, the First Amendment, and Article I of the Constitution, under a number of different theories. Yet the standards employed by the district court to describe these various violations share common elements. The district court found that a violation of the Equal Protection Clause is shown "if Plaintiffs establish that the 2016 Plan was enacted with discriminatory intent and resulted in discriminatory effects," without legitimate justification. *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 861 (M.D.N.C. 2018). The First Amendment was violated because "the 2016 Plan was intended to disfavor supporters of non-Republican candidates . . . [and] burdened such supporters' political speech and associational rights," and this burden was caused by that "discriminatory

motivation." *Id.* at 935. Article I was violated because "the 2016 Plan was intended to disfavor non-Republican candidates and supporters of such candidates," and in fact "yielded a congressional delegation with the intended composition," which made it a "successful 'attempt[] to "dictate election outcomes."'" *Id.* at 941 (citations omitted).

The district court in Maryland similarly found that the First Amendment would be violated if the plaintiffs could show "three elements: first, *specific intent*," meaning that district lines were drawn with the intent to burden "citizens because of how they voted or the political party with which they were affiliated," "second, *injury*—that the plaintiffs had, in fact, experienced a concrete burden," and "third, *causation*." *Benisek v. Lamone*, No. 1:13-cv-03233-JKB, 2018 U.S. Dist. LEXIS 190292 *32-33 (D. Md. Nov. 7, 2018) (internal quotations omitted).

The critical elements shared by every standard proposed by either district court are (1) the intent to draw districts that burden political opponents and (2) a resulting effect. As discussed below, these standards do not establish a workable test for gerrymandering. Because every district is drawn with partisan intent, the first element does not usefully distinguish between drawing a gerrymandered district that gives rise to a constitutional claim and drawing any other district. An element that is always present has no value as a test. Further, the need to show an effect is usually understood as the need to show some sort of change in electoral results. This element is worse than

useless, it is dangerous, because it indirectly imports a requirement of proportional representation. As long as the *absence* of proportional representation is considered to be a factor indicating partisan gerrymandering, then some form of proportional representation becomes a practical necessity.

If a test for gerrymandering is to be constructed, it must focus instead on the way mapmakers distort district lines. The test must focus, in other words, on the violation of such traditional districting criteria as district compactness and contiguity, and the extent to which district lines coincide with or ignore existing political boundaries. While both districts courts discussed these factors, and the *Rucho* court discussed them at length (318 F. Supp. 3d at 899-923), they relegated them to secondary evidence of partisan intent. This was surely unnecessary, as partisan intent was abundantly established by the frank admissions of those who drew the district lines. *See, e.g., id.* at 869; *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *10, 21-24. But it was also misguided. In fact, the violation of traditional districting criteria must be considered the key to constructing any manageable standard for identifying partisan gerrymandering. It is the only standard that can usefully distinguish a gerrymandered district from any other.

I. A Requirement that Plaintiffs Show Discriminatory Partisan Intent Is Meaningless, Because Partisan Mapmakers Always Have Partisan Intent.

The Court has frequently recognized that districting is always and everywhere animated by partisan motives. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences."); *Davis v. Bandemer*, 478 U.S. 109, 128 (1986) (plurality opinion) ("whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate"); *Vieth*, 541 U.S. at 285 (plurality opinion) ("The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Shaw v. Reno*, 509 U.S. 630, 662 (1993) (White, J., dissenting) ("districting inevitably is the expression of interest group politics").

In consequence, it is naive for the *Benisek* court to order the State of Maryland to draw districts "without considering how citizens are registered to vote or have voted in the past or to what political party they belong." *Benisek*, 2018 U.S. Dist. LEXIS 190292, at *78. This is like enjoining individuals to stop being self-centered, petty, or greedy, and will probably have as much practical effect. Gerrymandering will still go on, although mapmakers

might stop talking about it publicly. In fact, most elected officials know where their support is concentrated, with or without the aid of computers. If the district court's injunction were taken seriously, moreover, it would simply guarantee that every district in the country will be drawn by a federal judge.

The reality that partisan motives are inseparable from districting means that unconstitutional gerrymandering cannot be distinguished by partisan intent. Party spirit will be present wherever there are people, even on redistricting commissions. This element of the district courts' standards will always be met, and thus it performs no practical function as a test.

II. A Requirement that Plaintiffs Show a Particular Quantum of Electoral Harm Risks Becoming a Federal Guarantee of Proportional Representation.

To show that the partisan intent exhibited by North Carolina's mapmakers had an actionable effect, the *Rucho* court relied on a social scientist's "uniform swing analysis" and on a test of "partisan asymmetry" based on the "efficiency gap." 318 F. Supp. 3d at 885-86. The ultimate purpose of these analyses is to assess various ways in which the relative strength of the parties is apportioned by a particular district plan.

The assumption underlying these analyses is that it is possible to estimate what the parties' relative strengths "should" be in a "fair" districting

plan. As *amici* previously have argued at greater length, this assumption is doubtful, because the basic mathematical constants underlying such analyses are in dispute. *See* Brief for Judicial Watch and Allied Educational Foundation as *Amici Curiae* Supporting Appellants 9-12, *Gill v Whitford*, No. 16-1161, Aug. 4, 2017.

These analyses also seek to apply *average* estimates of changes in parties' strengths over time to draw conclusions about *particular* elections. As the defendants argued below, the efficiency gap, for example, "does not take into account a number of idiosyncratic considerations" that affect particular electoral outcomes. 318 F. Supp. 3d at 890. These considerations include the quality of candidates, scandals or local issues affecting a race, the money available to parties or candidates, or the effect of wave elections. The district court responded to this argument by noting that all of these factors were present at various times in the many elections that were averaged by the social scientist. *Id.* This badly misses the point. If a wave election, and not gerrymandering, is responsible for a particular "efficiency gap" in a particular election, then it is simply wrong to rely on that efficiency gap as evidence of gerrymandering.

More fundamentally, it is dangerous to use average measures of electoral strength as part of a test for gerrymandering. The reason is that conforming to these average measures will come to be viewed as a *requirement*. Mapmakers who wish to avoid being sued will understand that they must apportion electoral strength as the social scientists

tell them they should. In this way, some form of proportional representation will become a practical fact—not by fiat, but because of the incentives imposed by the threat of federal lawsuits.

III. The Only Manageable Way to Control Gerrymandering is to Look for and Enjoin the Distortion of District Lines.

The basic operation of partisan gerrymanders requires that voters be placed within or without districts on the basis of their partisan affiliations. Because voters do not choose where to live as a favor to politicians, electoral districts must be stretched and shrunk so as to include the partisan mix of voters that best suits the partisan mapmaker. The inevitable result is noncompact, even noncontiguous districts, which needlessly cross existing political boundaries.

Such violations of traditional districting criteria—especially extreme noncompactness—can be used as functional tests to identify and enjoin gerrymandering. *See Davis v. Bandemer*, 478 U.S. 109, 173 (1986) (Powell, J., concurring in part and dissenting in part) (of the factors that "should guide both legislators who redistrict and judges who test redistricting plans against constitutional challenges," the "most important . . . are the shapes of voting districts and adherence to established political subdivision boundaries"); *see id.* at n. 12 ("In some cases, proof of grotesque district shapes may, without more, provide convincing proof of unconstitutional gerrymandering."); *Vieth*, 541 U.S. at 348 (Souter, J., joined by Ginsburg, J., dissenting) (gerrymandering

can be shown in part where districts violate "traditional districting principles whose disregard can be shown straightforwardly: contiguity, compactness, respect for political subdivisions, and conformity with geographic features," noting that compactness "can be measured quantitatively in terms of dispersion, perimeter, and population ratios"). Indeed, the *Rucho* court identified the mathematical tools that could be used, including "the division of counties, municipalities, or precincts," and the Reock and Polsby-Popper compactness measures. 318 F. Supp. 3d at 899-900.[2]

The superiority of a district boundary standard focused on compactness, contiguity, and boundary crossings to the intent and effects standards proposed by the district courts can be simply demonstrated. Every district in North Carolina and Maryland—indeed, every district in the country—was draw with partisan intent, so looking for partisan intent will not help to distinguish extreme or actionable gerrymandering from all other kinds of districting. In the same vein, every district in the two states, and in the nation, will have a unique electoral profile, and one that differs from the average electoral profile to a certain extent. Nor is it surprising that that profile often will reflect the intent of the person who drew the

---

[2] Although the district court speculated in dicta that gerrymandering could be done while complying with traditional districting criteria, it acknowledged that that was not true in the case before it. While North Carolina's 2016 plan "improve[d] on the compactness of the 2011 Plan," a "number of districts . . . take on 'bizarre' and 'irregular' shapes explicable only by the partisan make-up of the precincts." 318 F. Supp. 3d at 883.

district. Once again, that electoral profile fails to distinguish a gerrymandered district from every other district.

But it is *not* the case that every other district in North Carolina and Maryland is as noncompact, for example, as the least compact districts in those states (North Carolina's old 12th District or current 2nd District, and Maryland's 3rd District). Those districts score poorly, both in their home states and nationally. Testing for compactness actually distinguishes between these and other districts. It is, in other words, a real test.

Amici respectfully submit that the only way to construct a manageable standard to identify unconstitutional gerrymandering is by considering quantifiable measures of a district plans' deviation from the traditional districting criteria of compactness, contiguity, and county, city, and precinct splits.

CONCLUSION

For the foregoing reasons, *amici* Judicial Watch, Inc. and Allied Educational Foundation respectfully request that the Court reverse the judgment of the district court.

Respectfully submitted,

Robert D. Popper
Counsel of Record
Eric W. Lee
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

February 12, 2019